

Public Records 101

Live from Tacoma

9.10.14

9.11.14

*Harold Goldes JD
Public Records Officer
DES Legal Services*

Program

- *Announcements*
- *Public Records Act: Definitions, Obligations, Risks*
- *PRA at DES*
- *PRA: 20th ▶ 21st Century*
- *PRA: Myths & Rumors*
- *PRA Selected Developments*



Public Records Act: Definitions, Obligations, Risks

Public Records Act (PRA)

...a strongly worded mandate for broad disclosure of public records.

Obligations

- *Strict compliance*
- *Appoint Public Records Officer.*
- *Acknowledge PRA requests in 5 days.*
- *Full Assistance.*
- *Diligent Search*

GOVERNMENT TRANSPARENCY

Agencies are more likely to be sued for withholding records than for what records actually contain.

Antidote to secrecy is transparency

Institutional inertia complicates disclosure

PRA: in 23 words

- Any writing containing information relating to government conduct ...
- ...prepared, owned, used, or retained by any state or local agency...

Disclose Liberally / Exempt Narrowly

Penalties! Why?

- Promote access to public records and government transparency.
- Deter improper denials of access to public records.
- Incentive to induce compliance.

If agency violates act, court considers penalty range set by legislature: \$0-\$100/ record / day

Penalty Factors (mitigating)

1. Unclear request.
2. Agency prompt response or legitimate follow-up clarification.
3. Good faith, honest, timely, and strict compliance with all PRA procedural requirements and exceptions.
4. Proper training and supervision of personnel.
5. Reasonable explanation for noncompliance.
6. Helpfulness of agency to requestor.
7. Public records tracking and retrieval systems.

Penalty Factors (aggravating)

1. Delayed response, especially if TOE
2. Lack of strict compliance with procedural requirements & exceptions.
3. Lack of proper training and supervision of personnel and response.
4. Unreasonable explanation for noncompliance.
5. Dishonesty, negligent, reckless, wanton, bad faith, or intentional noncompliance.
6. Potential for public harm, including economic loss, loss of governmental accountability or personal economic loss.
7. Penalty amount needed to deter future misconduct (consider agency size and the facts of case).

Penalties Hurt

2013- (UW)

Fined more than **\$720,000** for withholding 12,000 pages of public records from professor with EEOC complaint who believed she was wrongfully denied tenure.

2013- (L & I)

Seattle Times wins Fees, Costs And Penalties Against L&I.

Do Penalties Deter?

2013- UW

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2014 –WEST V PORT OF OLYMPIA

Remand to the trial court to

- Award West attorney **fees** and **costs**
- Determine if statutory penalty appropriate

Penalties

2009-2013 Gold Bar

- *cost of responding to voluminous requests and related litigation may **bankrupt** Gold Bar (pop. 2100)*
- *One of the largest expenses (and reasons for delay): need to search city officials' personal electronics and home computers, including sorting personal emails from City business.*



PRA at DES

PRA at DES

As of 9/1/14, DES responded to over 302 Public Records requests.

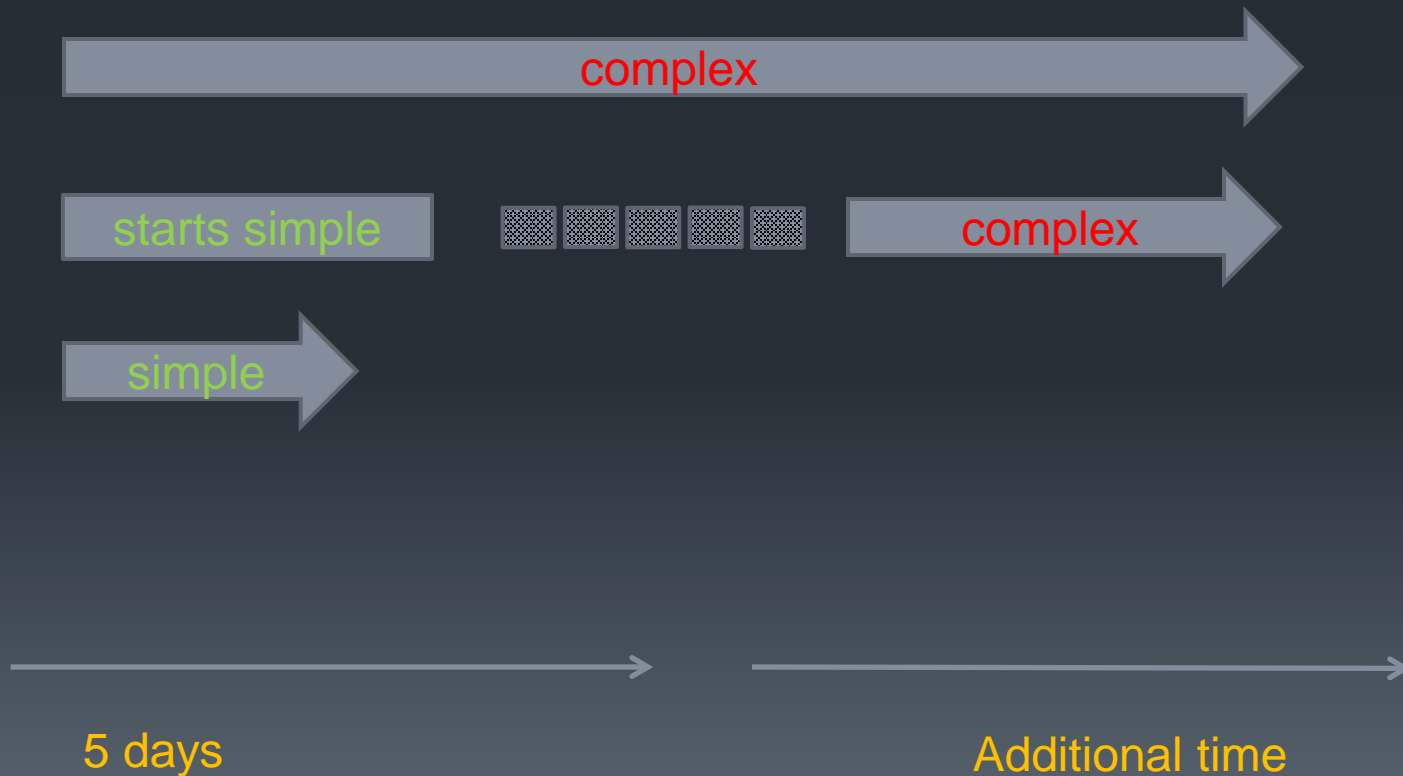
Some are closed in days...

Some in months...

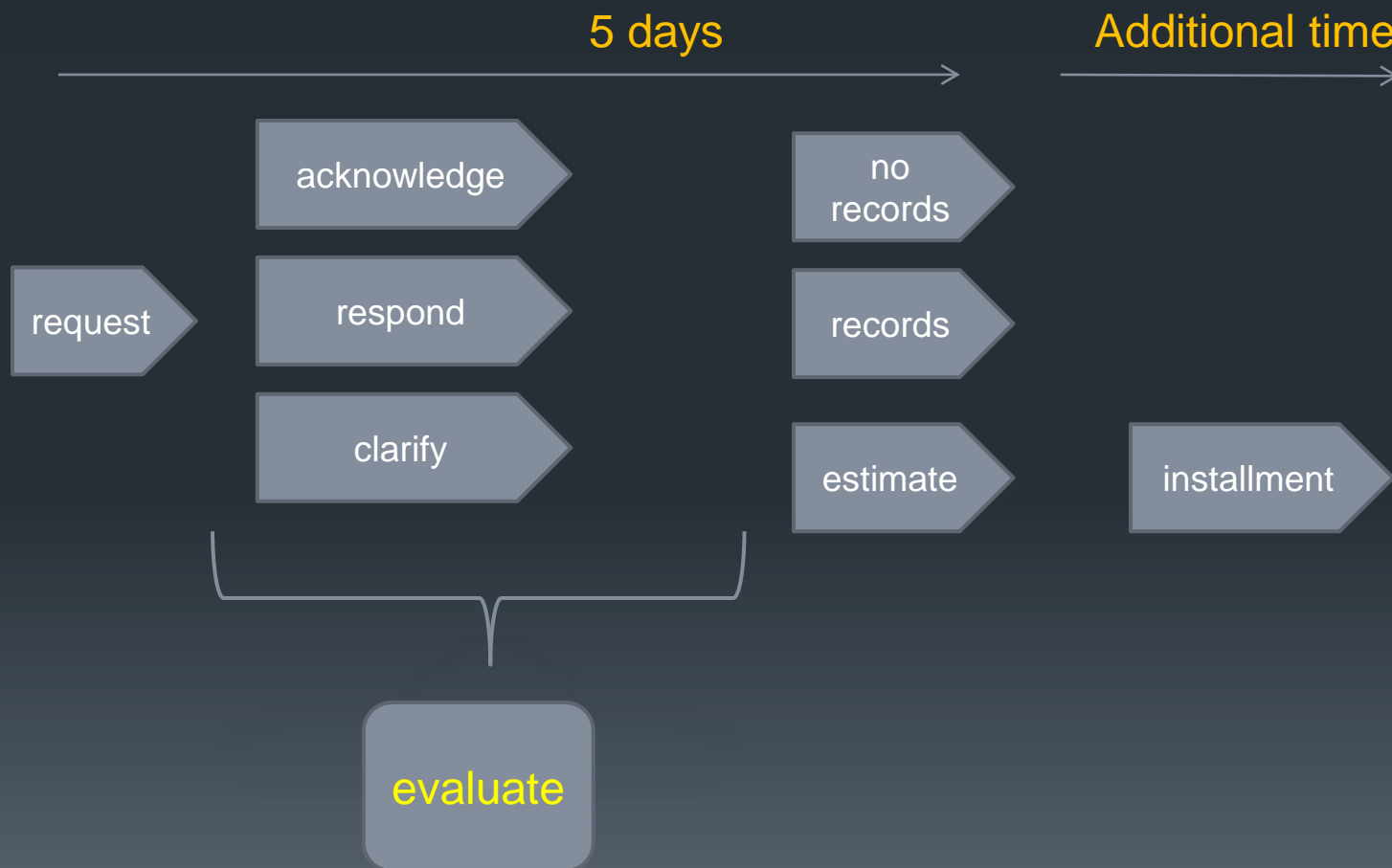
Some remain open....

Why?

Not All Requests Equal



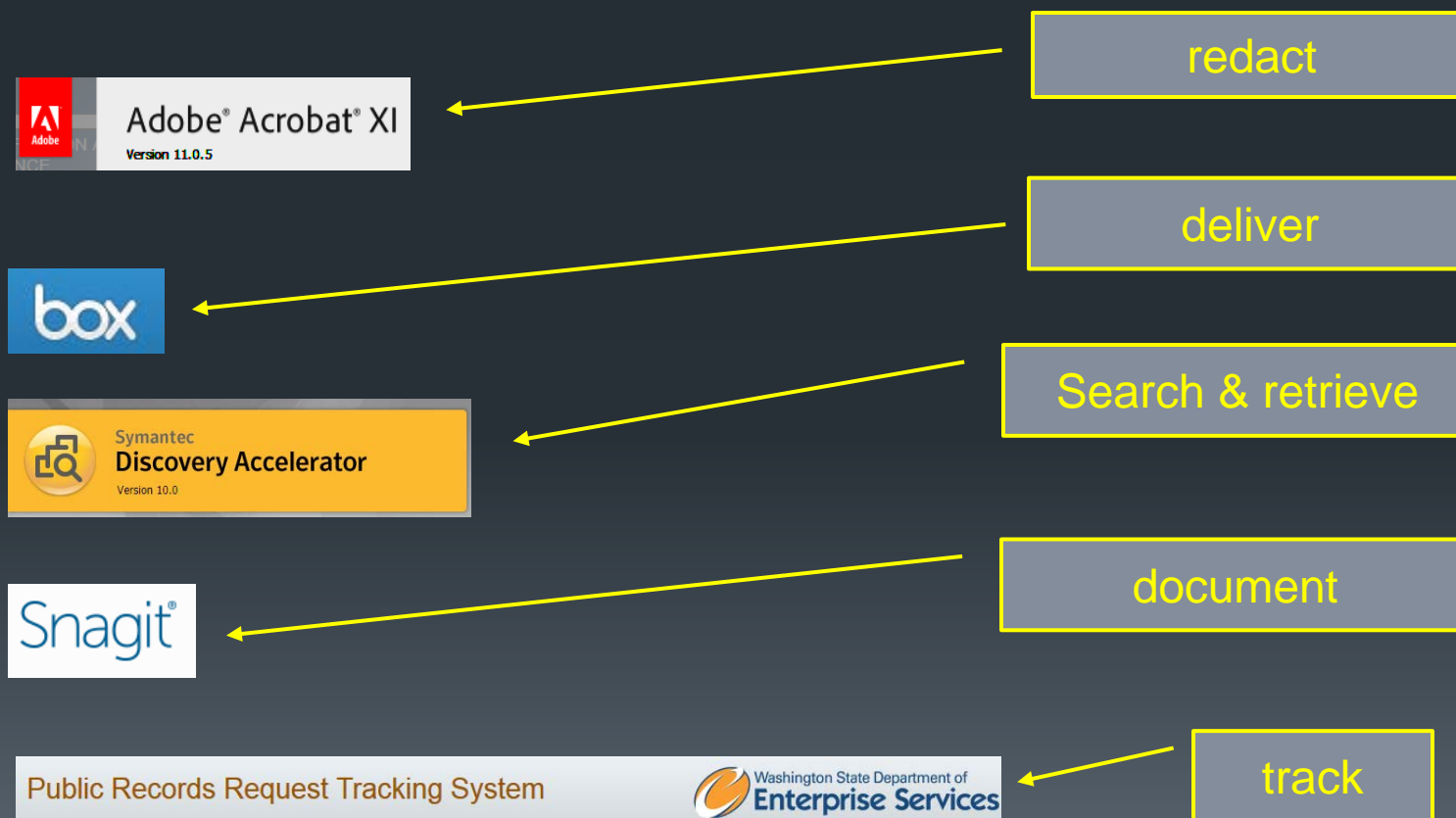
PUBLIC RECORDS PROCESS





What helps manage complexity?

Exploit software tools to manage public records efficiently and effectively:



Manage Records

Problem: *DES providing prevailing wage certified payroll records it did not possess.*

Risk: *Payroll records became public records subject to review and redaction of SSN.*

Solution: *Work with EAS and Rebound to explain legal requirements.*

Records Management

- Symbiosis Records Management & Public Records.
- To disclose records DES must have them.
- Records management ensures agency possesses records it must retain and disposes of records it does not.
- **Risk Factor:** Once requested, records must be produced even if the agency had no retention obligation.
- **Risk Factor:** Litigation holds and public records requests trump retention schedule.

Small Agency Resources

Problem: *complex, aggressive requests challenge small agencies.*

Requests may entangle HR issues

Limited resources to process, search, negotiate

Simple requests



simple

“...an electronic copy of all respondents’ proposals, including pricing, to the 05310 MPS RFP’s for Employment Security Department and the Department of Natural Resources.”

“...I just spoke to you on the phone and I wish to request all service records you can give me concerning this car vin # JTDKB22U553123099 also what price did this car sell for. Thank you so much for all your help.”

Complicated...

starts simple



complex

“...Under the Washington Public Records Act, §42.56 et seq., we are requesting to obtain copies of Hoffman Construction/Belay Architecture, Mortenson/SRG, and Sellen Construction/ZGF Architect’s submitted Request for Qualifications in response to 1063 Block Replacement Office Building (Project #2014-009)...”

“...copies of Alliant’s written RFP response and evaluations of the Written Responses and Oral Interviews” related to RFP 13-600...”

“...We would also like to request copies of Wells Fargo Insurance’s written RFP response and evaluations of the Written Responses and Oral Interviews related to RFP 13-600-ACCO - Insurance Broker Services....”

Complicated...

starts simple



complex

“Hello, I would like to request all proposal submissions and any corresponding changes, communications and additions, to these original proposals for all vendors (except Kronos and Timelink), for the following RFP:

*Washington State Department of Enterprise Services’ (DES)
Request for Proposals (RFP) No. 12-300-ACCO: Time, Leave and Attendance Solution*

In order of importance should they be dispursed separately are:

- 1)Workforce Software*
- 2)Infor*
- 3)All others”*

\$ court cost

What Causes Complications?

- Metadata/ Native format
- “Confidential” vendor records (ITD)
- Copyright or IP
- Reciprocal requests
- Recursion (*records related to my request*)
- Scope creep
- Paper or legacy digital records
(*commercially available / reasonably translatable*)
- Database Records
- Media requests
- Notice
- DES has bits

Evaluating requests

- ☐ Is this a public records request?
- ☐ Verbal?
- ☐ Easily accessible (digital or paper ?)
- ☐ Confidential/ proprietary?
- ☐ Time needed/ installments?
- ☐ “identifiable” record reasonably located based on description provided?
- ☐ Information not a request for public record.
 - ☐ relate to the conduct of government
 - ☐ prepared, owned, used, or retained by an agency
 - ☐ Not owned, used or retained by DES?
- ☐ Does it seek metadata/ native format?
 - ☐ Does record contain metadata?
 - ☐ Can record be produced with metadata intact?

Risk Horizon

Certain projects and topics generate aggressive Public Records requests or just inherent risk

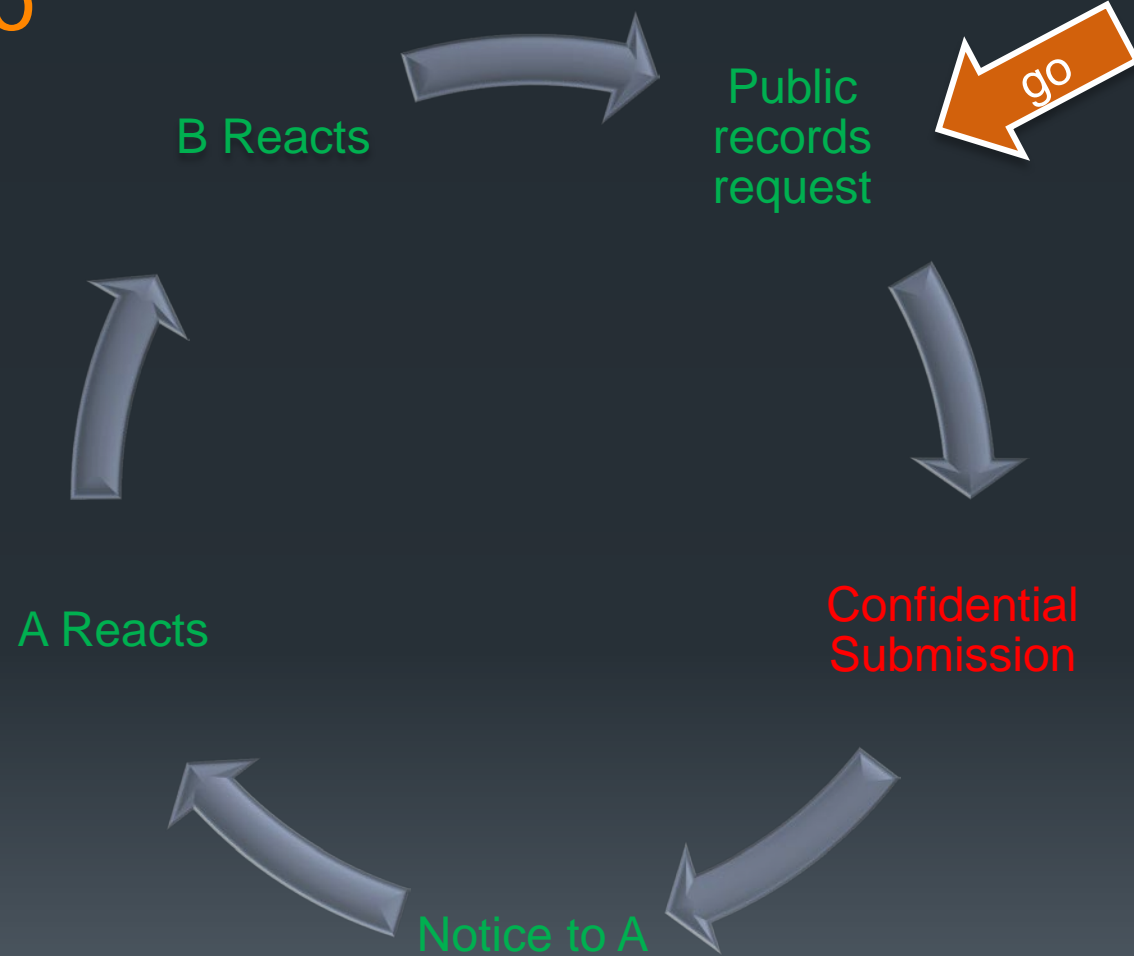
- Big \$ construction/ public works
- Economic interest (i.e. managed print, court reporting)
- Initiative 502: LCB auction
- Repetitive, detailed requests
- Frequent Requestors

Protest- Access To Records

Vendor debrief frequently triggers public records requests for other bid records.

Risk: Vendor cannot determine protest basis without all relevant records. Vendor may make unfocussed public records requests.

Protest- Access To Records







MYTHS & RUMORS

MYTHS & RUMORS

Attorney – Client
Privileged

What the RCW
meant..

That's private!

That's
confidential

*Always done it
that way....*

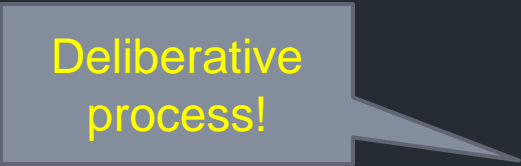
"our" records

Drafts

Why do they
need it ?!

*On my personal
device...*


Deliberative
process!



Deliberative
process!

West v. Port of Olympia July 2008

- PRA requests for Port documents regarding Weyerhaeuser lease negotiations.
- At time of requests, negotiations concluded.
- Port claimed documents exempt under deliberative process and other exemptions.



Deliberative
process!

Exemption Test

- DPE permits frank and uninhibited discussion during decision-making process.
- Exempts subordinates' predecision opinions or recommendations.
- Test- will disclosure:
 - injure deliberations or consultations?
 - inhibit flow of recommendations, observations, opinions?
- Do records contain policy recommendations and opinions not just raw facts data underlying decision.



That's private!

West v. Port Of Olympia 2014

- Issue- Accused employee' s right to privacy
- Port redacted employee name, job title, job duties, and other identifying details from investigative report relating to unsubstantiated allegations of governmental misconduct made against that employee..
- **Held-** Redactions violated PRA. Disclosure of identifying information not highly offensive to a reasonable person and therefore would not violate the employee' s right to privacy.

Privacy Test

Right to privacy violated when disclosure of information

- (1) highly offensive to reasonable person, and
- (2) not of legitimate public concern

Privacy Test: Highly offensive to ³⁸ reasonable person?

... something more than embarrassing but WA Supreme court has not attempted to define " highly offensive"

....whether disclosure of information is highly offensive to reasonable person must be determined on a case by case basis.

Cases considering sexual misconduct

- disclosure of identity of teacher accused of sexual misconduct highly offensive to a reasonable person.
- no distinction between a police officer accused of sexual misconduct and a teacher accused of sexual misconduct.

About accusation not truth/ falsehood: offensiveness implicit in nature of allegation of sexual misconduct.

Identity Not Exempt

Port violated PRA.

Allegation here ..

- much less offensive than alleged sexual abuse
- technically may amount to accusations of criminal conduct, does not seem to involve particularly reprehensible conduct.

BUT WHEN IN DOUBT...

The Law Favors Disclosure...

- Legislature is clear: courts must liberally construe PRA in favor of disclosure and narrowly construe exemptions to assure and protect public interest in full disclosure of public information.
- Any uncertainty whether disclosure of information is highly offensive, must be resolved **against** the public agency and **in favor of disclosure**.



PRA: 20th ► 21st Century

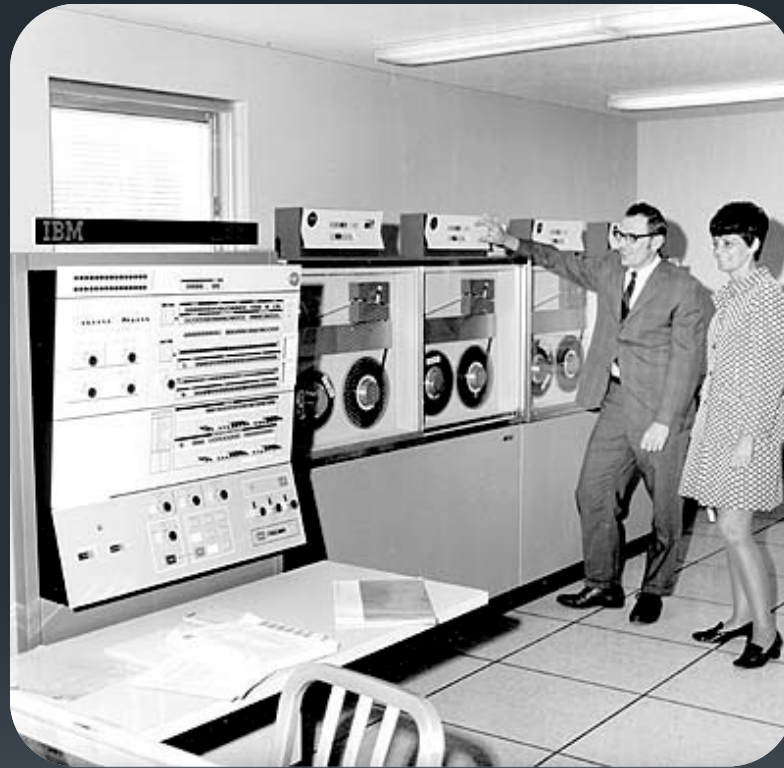
Public Records Act Passed in 1972

42



Electronic Records (~1970)

43





Then & Now

1972

- Physical records
- Limited computing power
- prepare/own/use/retain = clear

2014

- Records not just physical
 - Two places at once
 - Zombie records
 - prepare/own/use/retain = ?



Metadata (records you don't see...)



Metadata

- Data about data.
- Describes history, tracking, or management of electronic document
- Associated with a responsive record that may describe
 - Record content
 - Record structure
 - How record was created or transmitted through IT infrastructure

OLD SCHOOL DEVICES DID NOT CREATE RECORDS & METADATA

Paper in



Paper out

2014 DIGITAL DEVICES CREATE RECORDS & METADATA

*“EVERY
BREATH
YOU
TAKE....”*



*“EVERY
MOVE YOU
MAKE....”*

2014 DIGITAL DEVICES CREATE RECORDS & METADATA





Typical Microsoft Office Metadata

- Name & initials
- Company or organization name
- Computer name
- Network server or hard disk where document saved
- File properties & summary information
- Non-visible portions of embedded OLE objects
- Document revisions & Document versions
- Template information
- Hidden text & Comments



Downing Street Metadata

Contradicts denial of Blair government involvement in Iraq war

Rev. #1: "cic22" edited file "C:\DOCUME~1\phamill\LOCALS~1\Temp\AutoRecovery save of Iraq - security.asd"

Rev. #2: "cic22" edited file "C:\DOCUME~1\phamill\LOCALS~1\Temp\AutoRecovery save of Iraq - security.asd"

Rev. #3: "cic22" edited file "C:\DOCUME~1\phamill\LOCALS~1\Temp\AutoRecovery save of Iraq - security.asd"

Rev. #4: "JPratt" edited file "C:\TEMP\Iraq - security.doc"

Rev. #5: "JPratt" edited file "A:\Iraq - security.doc"

Rev. #6: "ablackshaw" edited file "C:\ABlackshaw\Iraq - security.doc"

Rev. #7: "ablackshaw" edited file "C:\ABlackshaw\A;\Iraq - security.doc"

Rev. #8: "ablackshaw" edited file "A:\Iraq - security.doc"

1 UNDER NEGOTIATION BETWEEN THE PARTIES. THOSE ARE
2 COMPLETELY NEW DOCUMENTS. THEY ARE SKEWED FOR ALL
3 KINDS OF ECONOMIC AND LEGAL REASONS AND IN
4 FACEBOOK'S FAVOR. THEY'RE NOT WHAT YOU WOULD
5 EXPECT A NEGOTIATED TRANSACTION OF THIS TYPE TO
6 LOOK LIKE.

7 SO THE FIRST REQUEST WE WOULD MAKE TO
8 YOUR HONOR IS THAT YOU NOT ENFORCE THAT AGREEMENT.

9 NOW, IN ADDITION TO THE CONTRACT LAW
10 PROBLEMS WITH THE DOCUMENT THAT THEY'RE TRYING TO
11 ENFORCE, AND I'D BE HAPPY TO EXPAND ON THOSE
12 FURTHER.

13 [REDACTED]
14
15
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23
24 THE COURT: AND I AM A LITTLE CURIOUS
25 ABOUT WHAT THE PARTIES AGREED TO IN THIS DOCUMENT.

NOW, IN ADDITION TO THE CONTRACT LAW
PROBLEMS WITH THE DOCUMENT THAT THEY'RE
TRYING TO ENFORCE, AND I'D BE HAPPY TO
EXPAND ON THOSE FURTHER.

THE OTHER PROBLEM WITH IT, WHICH WE ONLY
BECAME AWARE OF IN LATE MARCH, IS THAT IT
APPEARS THAT, THAT FACEBOOK COMMITTED
SECURITIES FRAUD IN CONNECTION WITH THE
NEGOTIATION OF THIS TERM SHEET.

AND, YOUR HONOR --

THE COURT: LET ME NOW TURN TO THAT.

MR. BARRETT: SURE.

THE COURT: BECAUSE IT SOUNDS LIKE I NEED
TO GET CLEAR ON WHAT IT IS THE TWO SIDES
WANT ME TO DO NOW.

MR. BARRETT: UH-HUH.

THE COURT: AND I AM A LITTLE CURIOUS

Metadata: Email

Subject: TEST MESSAGE
From: HAROLD GOLDES <HAROLDGOLDES@COMCAST.NET>
Date: Thu, 10 May 2007 00:54:07 -0700
To: HAROLD GOLDES <HAROLDGOLDES@COMCAST.NET>

Dear Mom- I am fine. Harold

From - Mon Apr 16 14:11:12 2007
X-Account-Key: account2
X-UIDL: 2007041621004101200h2hv9e001ha9
X-Mozilla-Status: 0001
X-Mozilla-Status2: 00000000
Received: from [192.168.1.100] (c-71-231-143-238.hsd1.or.comcast.net[71.231.143.238])
by comcast.net (sccrmhc12) with ESMTP
id <20070416210040012006alane>; Mon, 16 Apr 2007
21:00:40 +0000
Message-ID: <4623E66A.7070504@COMCAST.NET>
Date: Mon, 16 Apr 2007 14:11:06 -0700
From: HAROLD GOLDES <HAROLDGOLDES@COMCAST.NET>
User-Agent: Thunderbird 1.5.0.10 (Windows/20070221)
MIME-Version: 1.0
To: HAROLD GOLDES <HAROLDGOLDES@COMCAST.NET>
Subject: TEST MESSAGE
Content-Type: text/plain; charset=ISO-8859-1; format=flowed
Content-Transfer-Encoding: 7bit

CONTENTS

Dear Mom- I am fine. Harold



Metadata: Email



- *Normally not displayed online or printed in hard copy*
- *Not same as from, to, , cc, bcc lines*
- *May be required in a Public Records request*



PRA Selected Developments

Chapter 39.26 RCW PROCUREMENT OF GOODS AND SERVICES

39.26.030 State procurement records — Disclosure.

(1) Records related to state procurements are public records subject to disclosure to the extent provided in chapter 42.56 RCW except as provided in subsection (2) of this section.

(2) Bid submissions and bid evaluations are exempt from disclosure until the agency announces the apparent successful bidder

39.10.470 Public inspection of certain records — Protection of trade secrets — Protection of proposals submitted by design-build finalists.

(1) Except as provided in subsections (2) and (3) ..., all proceedings, records, contracts, and other public records relating to alternative public works transactions under this chapter shall be open to the inspection of any interested ...[party]...ration in accordance with ... [PRA]

(2) Trade secrets, as defined in RCW 19.108.010, or other proprietary information submitted in connection with an alternative public works transaction under this chapter shall not be subject to ...[PRA] if the bidder, offeror, or contractor specifically states in writing the reasons why protection is necessary, and identifies the data or materials to be protected.

(3) Proposals submitted by design-build finalists are exempt from disclosure until the notification of the highest scoring finalist is made in accordance with RCW 39.10.330(5) or the selection process is terminated.

Questions?

Harold Goldes JD
Public Records Officer,
DES Legal Services
harold.goldes@des.wa.gov
360.407.8768